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17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **OAKLAND DIVISION**

20 A WHITE AND YELLOW CAB, INC., a
21 California Corporation, dba A TAXI CAB, dba
22 1-800-4 MY TAXI,

23 Plaintiff,

24 vs.

25 UBER TECHNOLOGIES, INC., et al,

26 Defendants.

Case No.: 4:15-cv-05163-JSW

**CPUC DEFENDANTS' MOTION TO
DISMISS; NOTICE OF MOTION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: June 3, 2016
Time: 9:00 a.m.
Courtroom: 5, 2nd Floor
Judge: Hon Jeffrey S. White

Trial Date: N/A

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

The CPUC Defendants seek dismissal of the Complaint without leave to amend, and dismissal of the action. The Motion is based on this Notice, the Memorandum of Points and Authorities, the Exhibits ("Exh.") to the Uber Defendants' Request for Judicial Notice ("RJN")¹, the oral argument of counsel, and such other documents or information as may come before the Court upon hearing of this matter.

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1

SUMMARY OF ARGUMENT²

Plaintiff A White and Yellow Cab, Inc., ("Plaintiff") sues both the California Public Utilities Commission ("CPUC") and the five named CPUC Commissioners in their official capacity (collectively, "the CPUC Defendants"). Plaintiff challenges a CPUC Decision ("the Phase 1 Decision") in which the CPUC basically took two actions. First, the CPUC asserted jurisdiction over Transportation Network Companies ("TNCs"). Second, having asserted jurisdiction, the CPUC promulgated a number of rules to govern the TNCs' behavior. The CPUC Defendants will refer hereafter to the "jurisdictional portion" and the "rulemaking portion" of the Phase 1 Decision.

Plaintiff challenges the jurisdictional portion, purportedly on due process grounds. But Plaintiff's challenges amount to nothing more than assertions that the CPUC Defendants failed to conform their conduct to California law. As such, this Court is barred from hearing those claims under the Eleventh Amendment to the U.S. Constitution. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Plaintiff challenges the rulemaking portion under both due process and equal protection grounds. But this Court lacks jurisdiction over those claims as well, both under the Johnson Act, 28 U.S.C. § 1342, *see US West, Inc. v. Nelson*, 146 F.3d 718, 722 (9th Cir. 1998), and because Plaintiff's challenge to the rulemaking portion is not ripe for judicial review, *see Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 977 (9th Cir. 2003).

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, this Complaint should be dismissed without leave to amend.

² Per Rule 7 of Judge White's Civil Standing Order, this Summary does not count towards the fifteen-page limit for motions.

1 **MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT OF CPUC**
2 **DEFENDANTS' MOTION TO DISMISS**

3 **I. BACKGROUND**

4 **A. The California Public Utilities Commission**

5 The CPUC is "a state agency of constitutional origin with far-reaching duties, functions
6 and powers whose power to fix rates and establish rules has been liberally construed." *So. Cal.*
7 *Edison Co. v. Peevey*, 31 Cal. 4th 781, 792 (2003) (internal punctuation and quotations
8 omitted). The CPUC has plenary authority over public utility practices and facilities pursuant
9 to the California Constitution and the Public Utilities Code. Cal. Const., Art. XII; Cal. Pub.
10 Util. Code §§ 451, 701. The CPUC "may fix rates and establish rules for the transportation of
11 passengers . . . by transportation companies." Cal. Const., Art. XII, § 4.

13 **B. The CPUC's Jurisdiction over Transportation Providers**

14 In 1961, the California Legislature added the Charter-Party Carriers of Passengers Act
15 ("Charter-Party Act") to the California Public Utilities Code. Cal. Pub. Util. Code §§ 5351-
16 5444. The Charter-Party Act gave the CPUC jurisdiction over charter-party carriers, Cal. Pub.
17 Util. Code § 5381; required that all charter-party carriers obtain operating authority from the
18 CPUC, Cal. Pub. Util. Code § 5371; and authorized the Commission to set additional rules and
19 regulations to ensure that charter-party carriers operate safely, Cal. Pub. Util. Code § 5381.

21 A charter-party carrier is any "person engaged in the transportation of persons by motor
22 vehicle for compensation, whether in common or contract carriage, over any public highway in
23 this state." Cal. Pub. Util. Code § 5360. The CPUC recognizes two types of charter-party
24 carriers: Passenger Stage Corporations ("PSC") and Transportation Charter Parties ("TCP").
25 *See* RJN, Exh. B, p. 2 [Doc. 18-4, p. 80]. The Charter-Party Act exempts taxicabs from the
26

1 CPUC's jurisdiction, Cal. Pub. Util. Code § 5353(g); taxicabs are instead generally regulated
2 by local municipalities, *see* Cal. Gov. Code § 53075.5.

3 Under the California Public Utilities Code, the distinction between taxicabs and
4 charter-party carriers hinges on the concept of “prearrangement”: a ride is "prearranged" when
5 "the transportation of the prospective passenger was arranged with the carrier by the passenger,
6 or a representative of the passenger, either by written contract or telephone." Cal. Pub. Util.
7 Code § 5360.5. Charter-party carriers may only operate on a prearranged basis, Cal. Pub. Util.
8 Code § 5360.5(a), and must carry a paper or electronic waybill demonstrating prearrangement,
9 Cal. Pub. Util. Code § 5381.5. Taxicabs, on the other hand, may accept “street hails” where no
10 arrangement for transportation is made until the passenger actually steps into the vehicle. *See*
11 RJN, Exh. A, p. 20 [Doc. 18-4, p. 22].

12 **C. The Commission’s TNC Rulemaking Proceeding and Determination** 13 **Regarding Jurisdiction Over Transportation Network Companies**

14 In 2012, a new form of transportation service emerged in California, primarily
15 associated with companies such as Uber, Lyft, and Sidecar. *See* RJN, Exh. G, p. 4 [Doc. 18-5,
16 p. 19]. These companies all developed smartphone applications that allowed non-professional
17 drivers, driving their own personal vehicle, to transport passengers in exchange for a fee. RJN,
18 Exh. G, p. 1 [Doc. 18-5, p. 16]. The CPUC would eventually name these companies
19 Transportation Network Companies. RJN, Exh. A, p. 2 [Doc. 18-4, p. 4]. Controversy quickly
20 arose as to whether these new services should be regulated; by whom; and as what (i.e., as
21 taxicabs or as charter-party carriers).

22 In December 2012, the CPUC opened an administrative rulemaking proceeding ("the
23 TNC Rulemaking") to address this new form of transportation service. RJN, Exh. G. On
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1 December 20, 2012, the CPUC served notice of the proceeding on a wide array of potentially-
2 interested persons and entities. *See* RJN, Exh. G, Attachment A [Doc. 18-5, pp. 31-33]. The
3 notice set forth the subject and scope of the TNC Rulemaking, RJN, Exh. G, p. 10 [Doc. 18-5,
4 p. 25], and explained how to participate in the TNC Rulemaking, including how to become a
5 party, and how to receive information, notices, and documents associated with the TNC
6 Rulemaking. RJN, Exh. G, pp. 11-13 [Doc. 18-5, pp. 26-28]. As is its regular practice, the
7 CPUC also published notice of the proceeding on its Daily Calendar, which is available on the
8 CPUC's website. *See* Cal. Code Regs., tit. 20, §§ 1.71, 6.1.

11 A wide range of parties participated in the TNC Rulemaking, including members of the
12 public; taxicab and limousine companies, drivers, and trade groups; the TNCs themselves;
13 cities and counties; taxicab commissions; airports; insurance industry representatives; the
14 California Highway Patrol; and environmental, disability rights, and consumer advocacy
15 groups. RJN, Exh. A, pp. 5-7 [Doc. 18-4, pp. 7-9] (summarizing participation from various
16 parties). These groups submitted multiple rounds of written opening and reply comments on
17 various legal, factual, and policy issues; they attended a pre-hearing conference, a two-day
18 workshop, and a public participation hearing; and they filed a welter of legal pleadings. *See id.*

21 In September 2013, the CPUC closed the first phase of the proceeding by issuing
22 Decision 13-09-045 ("the Phase 1 Decision").³ RJN, Exh. A. The Phase 1 Decision
23 considered whether TNCs should be treated as taxicabs, and instead found that TNCs were
24 charter-party carriers pursuant to California Public Utilities Code § 5351 *et seq.* and should be
25 regulated by the CPUC under those provisions. RJN, Exh. A, p. 23 [Doc. 18-4, p. 25]. The

27 ³ The CPUC often bifurcates its proceedings or splits them into phases. *See, e.g., San Pablo Bay*
28 *Pipeline Co., LLC v. Pub. Util. Comm'n*, 243 Cal. App. 4th 295, 314 (Cal. Ct. App. 2015).

1 Phase 1 Decision also implemented various additional rules that TNCs must abide by, above
2 and beyond what is required in the Public Utilities Code for charter-party carriers, such as the
3 implementation of driver background checks. RJN, Exh. A, pp. 26-35 [Doc. 18-4, pp. 28-37].
4 The CPUC stated that the TNC Rulemaking was not closed, but would carry on into a Phase 2.
5 RJN, Exh. A, p. 3 [Doc. 18-4, p.5].
6

7 The Phase 1 Decision has already survived legal challenge. In May 2014, the Taxicab
8 Paratransit Association of California, a statewide trade organization, petitioned for review of
9 the Phase 1 Decision in both the California Supreme Court and Court of Appeal, making many
10 of the same arguments that Plaintiff raises here. RJN, Exhs. K-L. After some procedural
11 wrangling, the California Supreme Court summarily denied both petitions.⁴ See RJN, Exh. M.
12

13 Following the Phase 1 Decision, the California Legislature blessed the Phase 1
14 Decision by recognizing TNCs; adopting the CPUC's definition of a TNC; recognizing the
15 CPUC's jurisdiction over TNCs; and adding additional TNC insurance requirements. See Cal.
16 Pub. Util. Code §§ 5430-5444. In response to that legislation, the Commission adopted
17 Decision 14-11-043 ("the Insurance Decision") expanding and clarifying insurance
18 requirements for TNCs. RJN, Exh. V.
19

20 On January 25, 2016, the Assigned Commissioner issued her Proposed Decision on
21 Phase 2 of the TNC Proceeding ("Proposed Phase 2 Decision"). RJN, Exh. N. As of the date
22 of this filing, the CPUC, acting through the five Commissioners, has not formally approved the
23 Proposed Phase 2 Decision, which is therefore not final. See Cal. Pub. Util. Code § 311(d) (the
24
25
26

27 ⁴ Under California law, such summary denials are decisions on the merits, and are res judicata.
28 See *United Parcel Serv. v. Pub. Util. Comm'n*, 77 F.3d 1178, 1187 (9th Cir. 1996). They do not,
however, have a stare decisis effect. See *id.*

Commissioners may "adopt, modify, or set aside the proposed decision or any part of the decision.").

If the Proposed Phase 2 Decision is approved without substantive change, that Decision would, among other things, set rules for TNC vehicle inspections and the maintenance of inspection records; set rules for driver background checks for certain types of TNCs; and set rules for the TNCs' trade dress. RJN, Exh. N, pp. 5-7 [Doc. 18-7, pp. 124-126] (summarizing contents of Proposed Decision). Particularly relevant here, the Proposed Decision would require TNCs to certify the nature of their operations and how fares are calculated, and would set rules on fare-splitting operations. RJN, Exh. N, pp. 6-7 [Doc. 18-7, pp. 125-126]. The Proposed Phase 2 Decision would keep the TNC Rulemaking open to consider "any additional issues deemed relevant to the regulation of TNCs." RJN, Exh. N., p. 7 [Doc. 18-7, p. 126].

II. LEGAL ARGUMENT

A. Standard of Review

"When ruling on a motion to dismiss, [the Court] may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) (internal quotations omitted). The Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint," *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998), and courts "do not . . . necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide*, 328 F.3d 1136, 1139 (9th Cir. 2003). Moreover, where a motion to dismiss is based on extrinsic evidence, there is no presumption that the allegations in the Complaint are true, and a court may look at matters of public record

without converting the motion into one for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

B. Plaintiff's Challenges to the Jurisdictional Portion of the TNC Phase 1 Decision, Suit Against the CPUC as an Entity, and Claims for Monetary Damages are all Barred by the Eleventh Amendment

1. Plaintiff may not sue the CPUC Defendants under state law

"[I]n the absence of consent, a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst*, 465 U.S. at 100; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000) ("[T]he Constitution does not provide for *federal jurisdiction* over suits against nonconsenting States.") (emphasis added). Through the *Ex Parte Young* doctrine, in limited circumstances private litigants may sue state officials in their official capacities, and Plaintiff has sued the five named Commissioners here. *Ex Parte Young*, 209 U.S. 123, 156-157 (1908). But *Ex Parte Young* does not apply to suits brought against state officials under state laws, as the Supreme Court noted in *Pennhurst*:

[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* . . . [is] inapplicable in a suit against state officials on the basis of state law.

Pennhurst, 465 U.S. at 106. Plaintiff's challenges to the jurisdictional portion of the Phase 1 Decision invite this Court to instruct the CPUC Defendants on how to conform their conduct to California law, in clear violation of *Pennhurst* and the Eleventh Amendment.

Plaintiff first asserts that the CPUC Defendants exercised jurisdiction over the TNCs "in contradiction to its own authority" under California Public Utilities Code Section 5353(g), Compl. pp. 31-32, ¶ 87, which precludes CPUC jurisdiction over "[t]axicab transportation

1 service licensed and regulated by a city or county" Cal. Pub. Util. Code § 5353(g). Even
2 if Plaintiff were right, that is a question of California law, not federal law, and therefore not for
3 this Court to answer. Likewise, Plaintiff asserts that the jurisdictional portion of the Phase 1
4 Decision "was in direct contradiction to" California Government Code Section 53075.5, which
5 requires cities and counties to regulate taxicabs. Compl. p. 32, ¶ 88; Cal. Gov. Code
6 § 53075.5. Again, even were that true, it is for the California courts to decide.⁵

8 Plaintiff finally asserts that the jurisdictional portion of the Phase 1 Decision is
9 unconstitutionally vague under the due process clauses of the Fifth and Fourteenth
10 Amendments because, Plaintiff asserts, the CPUC Defendants put forth an unclear definition of
11 the term "prearrangement." Compl. p. 33, ¶ 94. This argument, at least, is cast as a federal
12 issue, but here is the problem with it: In promulgating the jurisdictional portion of the Phase 1
13 Decision, the CPUC Defendants did not create a new definition of "prearrangement," but found
14 that the TNCs' services met the existing definition of "prearrangement" set forth in California
15 Public Utilities Code Section 5360.5. *See* RJN, Exh. A, pp. 20-21 [Doc. 18-4, pp. 22-23]; Cal.
16 Pub. Util. Code § 5360.5(b) (" '[P]rearranged basis' means that the transportation of the
17 prospective passenger was arranged . . . either by written contract or telephone."). That
18 definition was codified in 1999, long before the present dispute arose, and Plaintiff does not
19 challenge its validity. Thus, Plaintiff's argument here can only be understood as asserting that,
20 in exercising jurisdiction over the TNCs, the CPUC Defendants misinterpreted the existing
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24
25 ⁵ Here, Plaintiff also attacks Sections 5430-5443 of the California Public Utilities Code as
26 "seek[ing] to codify and legitimize part of a void or voidable act by the Commissioners . . . in
27 excess of their authority." Compl. p. 32, ¶ 88. The CPUC Defendants admit to not
28 understanding this argument: Surely the California Legislature has the authority to decide what
California's laws ought to be. But again, even if Plaintiff were right, its challenge to those
provisions of the Public Utilities Code hinge on its attacks against the jurisdictional portion of
the Decision *under state law*.

1 statutory definition of "prearrangement" as set forth in Section 5360.5. That is, yet again, a
2 pure question of state law, which Plaintiff may not bring against the CPUC Defendants in this
3 Court without violating the Eleventh Amendment.
4

5 This Court lacks jurisdiction to consider Plaintiff's challenges to the jurisdictional
6 portion of the Phase 1 Decision. Plaintiff cannot cure this jurisdictional defect through
7 amendment; therefore, this part of the Complaint should be dismissed without leave to amend.
8 Two Eleventh Amendment issues remain.

9
10 **2. Plaintiff may not sue the CPUC as an entity**

11 As well as bringing this suit against the five named Commissioners, which is
12 permissible under *Ex Parte Young*, Plaintiff has sued the CPUC as an entity, which is not. The
13 CPUC is an arm of the State of California, established by Article XII of the California
14 Constitution, and is protected by the Eleventh Amendment. *Sable Commc'ns of Cal. v. Pac.*
15 *Tel. & Tel. Co.*, 890 F.2d 184, 191 (9th Cir. 1989). Plaintiff has not asserted that the CPUC
16 has consented to the jurisdiction of this Court, and could not plausibly do so. *See Jachetta v.*
17 *United States*, 653 F.3d 898, 908 (9th Cir. 2011) (holding that a state waives its immunity
18 "only where stated by the most express language") Because the CPUC is an arm of the
19 State of California, and has not consented to federal jurisdiction, this Court lacks jurisdiction
20 over it, and all of the claims against it must therefore be dismissed. *Pennhurst*, 465 U.S.
21 at 100.
22
23

24 **3. Plaintiff may not sue the CPUC Defendants for monetary**
25 **damages**

26 Plaintiff finally prays for "past and future damages against the Commissioners and the
27 CPUC" Compl., Prayer ¶ 14. It is well settled that "a suit by private parties seeking to
28 impose a liability which must be paid from public funds in the state treasury is barred by the

1 Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). This is so even when a
2 state official, rather than the state itself, is the named defendant. *Id.*; see *Cardenas v. Anzai*,
3 311 F.3d 929, 935 (9th Cir. 2002).

4
5 Moreover, legislative immunity acts as an absolute bar to claims for damages against
6 state officials, such as the five named Commissioners here, for their legislative conduct.
7 "Legislative conduct" means not just traditional legislation, but also to decisions encompassing
8 discretion and policymaking, *Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998), that is,
9 essentially any conduct "in the sphere of legitimate legislative activity." *Lake Country Estates,*
10 *Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403-06 (1979). "Public utility regulation,
11 historically, has been a function of the legislature. . . ." thus, when a state commission regulates
12 utilities "as the authorized representative of the legislature, [that] is recognized to be essentially
13 a legislative act." *Pub. Util. Comm'n v. United States*, 356 F.2d 236, 241 (9th Cir. 1966). The
14 CPUC's regulation of TNCs is plainly a legislative act.
15
16

17 Both because Plaintiff's prayer for damages against the CPUC Defendants is barred by
18 the Eleventh Amendment, and because the CPUC Defendants are absolutely immune, this
19 Court should dismiss Plaintiff's prayer for damages against the CPUC Defendants.
20

21 **C. This Court Lacks Jurisdiction Over Plaintiff's Challenges to the**
22 **Rulemaking Portion of the Phase 1 Decision**

23 Plaintiff goes on to bring various constitutional claims against the rulemaking portion
24 of the Phase 1 Decision. They are all barred. First, they all fall afoul of the Johnson Act,
25 28 U.S.C. § 1342. Second, none of them are ripe for adjudication. All of these claims should
26 be dismissed.
27
28

1 **1. The Johnson Act Divests this Court of Jurisdiction**

2 The Johnson Act, 28 U.S.C. § 1342, bars federal courts from exercising jurisdiction
3 over constitutional challenges to state commission orders affecting rates. *See Tennyson v. Gas*
4 *Service Co.*, 506 F.2d 1135, 1138 (10th Cir. 1974) (holding that the Johnson Act removes
5 federal jurisdiction over constitutional challenges to state orders affecting rates "lock, stock
6 and barrel"). Under the Johnson Act:

7
8 The district courts shall not enjoin, suspend or restrain the operation of, or compliance
9 with, any order affecting rates chargeable by a public utility and made by a State
10 administrative agency or a ratemaking body of a State political subdivision, where:

- 11 (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to
12 the Federal Constitution; and,
13 (2) The order does not interfere with interstate commerce; and,
14 (3) The order has been made after reasonable notice and hearing, and
15 (4) A plain, speedy and efficient remedy may be had in the courts of such State.

16 28 U.S.C. § 1342. By its use of the broad phrase "order affecting rates," the Johnson Act
17 applies not only to direct ratesetting orders, but to states' ratemaking systems as a whole,
18 "including any particular procedure that the system employs" *US West*, 146 F.3d at 722.

19 The Phase 1 Decision lays out requirements for the TNCs including, but not limited to,
20 insurance limits, background checks, and the recovery of costs from passengers. RJN, Exh. A,
21 pp. 26-35, 40 [Doc. 18-4, pp. 28-37, 42]. These rules necessarily affect the TNCs' fares –
22 indeed, during the TNC Rulemaking, several taxicab companies and industry groups argued
23 that if the regulations for TNCs were more lenient than those for taxicabs, taxicabs would be at
24 a price disadvantage. RJN, Exh. A, pp. 60-61 [Doc. 18-4, pp. 63-64]. Plaintiff makes
25 essentially the same arguments here, repeatedly asserting that the CPUC's rules allow the
26 TNCs to implement "surge pricing," "safe ride fees," and other practices, all of which are
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1 allegedly to Plaintiff's detriment, and all of which concern the TNCs' rates. *See, e.g.*, Compl.
2 p. 14, ¶ 39. And the Proposed Phase 2 Decision discusses in detail the TNCs' new fare-
3 splitting services, and the fares chargeable by them; and requires the TNCs to certify how they
4 calculate those fares. RJN, Exh. N, pp. 42-50 [Doc. 18-7, pp. 161-169]. In sum, Plaintiff
5 challenges the CPUC's entire system of regulation over the TNCs, which necessarily affects the
6 TNCs' rates. The Phase 1 Decision is, therefore, an order affecting rates within the meaning of
7 the Johnson Act.
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10 Turning now to the four prongs of the Johnson Act: The Complaint is based in large
11 part on the Fifth and Fourteenth Amendments, and it is those substantive claims that purport to
12 give this Court jurisdiction over the CPUC Defendants. Compl. 31-43, ¶¶ 84-106; Prayer for
13 Relief, ¶¶ 13. The first prong of the Johnson Act is clearly met. *See Peoples Nat'l Utility Co.*
14 *v. Houston*, 837 F.2d 1366, 1368 (5th Cir. 1988) (holding that Johnson Act barred due process
15 and takings claims, and that "Plaintiffs may not use § 1983 as an 'end run' around the Johnson
16 Act.").

17
18 The second prong is clear as well: Plaintiff does not allege that the Phase 1 Decision
19 interferes with interstate commerce. There is nothing in the record that would demonstrate
20 such interference. The CPUC's constitutional and statutory authority only extends to California
21 public utilities and their *intrastate* rates and services. *See* Cal. Pub. Util. Code § 701 ("The
22 [CPUC] may supervise and regulate every public utility *in the State*" (emphasis added)).
23 And, for purposes of the Johnson Act, state agency orders affecting intrastate utility rates do
24 not interfere with interstate commerce, even if they may have an incidental interstate effect.
25 *US West*, 146 F.3d at 724. For these reasons the second prong of the Johnson Act is clearly
26 met.
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28

1 As to the third prong: Plaintiff does not allege that it lacked notice or an opportunity to
2 be heard. The CPUC has a statutory obligation to provide such notice and hearing, Cal. Pub.
3 Util. Code §§ 1701-1736; its own rules of practice and procedure require the same thing, Cal.
4 Code Regs., tit. 20, §§ 1.71, 6.1, 13.1-13.14; and, in the absence of clear evidence to the
5 contrary, the CPUC is entitled to a presumption that it regularly discharged its official duties.
6 *See County of Del Norte v. United States*, 732 F.2d 1462, 1468 (9th Cir. 1984). And the record
7 of the TNC Rulemaking plainly shows that a vast array of interested parties could and did
8 participate in the proceeding. RJN, Exh. A, pp. 5-7 [Doc. 18-4, pp. 7-9] (summarizing
9 participation from various parties). The third prong of the Johnson Act has been met.

12 Finally, Plaintiff can pursue a plain, speedy and efficient remedy in the California
13 judicial system. *See* Cal. Pub. Util. Code §§ 1756-1767. In *Brooks v. Sulphur Springs Valley*
14 *Electric Cooperative*, 951 F.2d 1050, 1055-56 (9th Cir. 1991), the Ninth Circuit found that a
15 statutory scheme similar to the judicial review provisions of the Public Utilities Code met the
16 fourth prong of the Johnson Act. The California courts are fully capable of reviewing
17 constitutional challenges to CPUC orders, and it is to them that Plaintiff should have turned.

19 Since all four prongs of the Act are easily met, the Johnson Act bars Plaintiff's
20 challenge to the rulemaking portion of the Phase 1 Decision. *See US West*, 146 F.3d at 726.

22 **2. Plaintiff's Claims are Not Ripe**

23 Plaintiff challenges the rulemaking portion of the Phase 1 Decision. That Decision
24 does not exist in a vacuum; it comes instead as part of the ongoing TNC Rulemaking
25 proceeding. All of the substantive rules about which Plaintiff complains remain in play before
26 the CPUC; none of the issues have been finally decided. Because the CPUC's regulations are
27

1 not yet "at an administrative resting place," *Citizens for Better Forestry*, 341 F.3d at 977,
2 Plaintiff's challenges to the rulemaking portion of the Phase 1 Decision are not ripe.

3 Ripeness is a justiciability doctrine "drawn both from Article III limitations on judicial
4 power and from prudential reasons for refusing to exercise jurisdiction" *Nat'l Park*
5 *Hospitality Ass'n v. Dept. of the Interior*, 538 U.S. 803, 808 (2003) (internal quotation
6 omitted). In determining whether a challenge to agency action is ripe, one of the factors to
7 consider is "whether judicial intervention would inappropriately interfere with further
8 administrative actions" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733
9 (1998). Judicial review is premature when an agency's decision is not yet "at an administrative
10 resting place." *Citizens for Better Forestry*, 341 F.3d at 977. Put another way, a claim is ripe
11 for review when it is not "merely tentative or interlocutory," but rather the agency "has
12 rendered its last word on the matter." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 462 F.3d
13 977, 984 (9th Cir. 2006).

14 Plaintiff concedes, as it must, that the CPUC's rulemaking is ongoing: Plaintiff states,
15 for example, that "[t]he CPUC has treated and continues to treat its TNC Regulation as a sort
16 of 'work in progress.' " Compl. p. 35, ¶ 94. The CPUC Defendants agree. On January 25,
17 2016, the CPUC promulgated its Proposed Phase 2 Decision, which may address at least some
18 of Plaintiff's concerns. Until the Commission votes on the Proposed Phase 2 Decision, it is
19 not final, but instead may be adopted, modified, or set aside, in whole or in part. See Cal. Pub.
20 Util. Code § 311(d). "[I]f an initial agency action may be modified or reversed during
21 administrative reconsideration or review, it is rendered non-final while such review is
22 pending." *Puget Sound Energy, Inc. v. U.S.*, 310 F.3d 613, 625 (9th Cir. 2002).

1 Even if it does become final, as drafted, the Proposed Phase 2 Decision would leave the
2 TNC Rulemaking open to consider "any additional issues deemed relevant to the regulation of
3 TNCs." RJN, Exh. N., p. 7 [Doc. 18-7, p. 126]. It is difficult to imagine a more open-ended
4 reservation of rulemaking authority. Plaintiff asserts that this renders vague those rules already
5 adopted. Compl. pp. 35-36, ¶ 94. But this rulemaking concerns an industry, TNCs, which did
6 not exist five years ago, and which changes every day. The CPUC should be allowed to
7 continue monitoring the TNC market in California as it evolves. The CPUC must not be
8 locked in to rules that fail to keep pace with that evolving market.
9
10

11 Because the rules set forth in the rulemaking portion of the Phase 1 Decision are not yet
12 "at an administrative resting place," *Citizens for Better Forestry*, 341 F.3d at 977, Plaintiff's
13 challenges to the rulemaking portion are unripe, and should be dismissed without leave to
14 amend.
15

16 **III. CONCLUSION**

17 For all of the reasons stated above, the CPUC Defendants respectfully ask this Court to
18 dismiss Plaintiff's claims without leave to amend.

19 Dated: March 7, 2016

Respectfully submitted,

20
21 AROCLES AGUILAR
22 HARVEY Y. MORRIS
23 MITCHELL SHAPSON
24 POUNEH GHAFARIAN
25 JONATHAN C. KOLTZ

26 By: /s/ MITCHELL SHAPSON

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28 _____
Mitchell Shapson

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I certify that all participants in the case are registered with CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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